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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
|---|---|---|---|---|
| 10/806,410 | 03/23/2004 | Wendy Zellen | 1358-11 | 2308 |

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GOWAN INTELLECTUAL PROPERTY
1075 NORTH SERVICE ROAD WEST
SUITE 203
OAKVILLE, ON L6M-2G2
CANADA

| EXAMINER | |
|---|---|
| TRAN LIEN, THUY | |
| **ART UNIT** | **PAPER NUMBER** |
| 1794 | |

| MAIL DATE | DELIVERY MODE |
|---|---|
| 12/14/2007 | PAPER |

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

| Office Action Summary | Application No. | Applicant(s) | |
|---|---|---|---|
| | 10/806,410 | ZELLEN ET AL. | |
| | Examiner | Art Unit | |
| | Lien T. Tran | 1794 | |

*-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --*

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

1)☒ Responsive to communication(s) filed on *04 October 2007*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

4)☒ Claim(s) *1,2,6-9,11,12,14 and 17-19* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1,2,6-9,11-12,14,17-19* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

**Application Papers**

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

Claims 1,2, 6-9,11-12,14,17-19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kincs et al in view of Peleg et al and the book " Professional Baking".

Kincs et al disclose a pie crust comprising flour, water and frozen oil system. The oil can be soybean oil, cottonseed oil, peanut oil, corn oil and combinations thereof. Kincs et al do not disclose that the oil is winterized; thus, the oil is non-winterized ( see page 2 lines 28-47, col. 4 lines 13-16, col. 5 lines 1-10). Kincs et al also disclose a process to make pelletized shortening. The process comprises the steps of melting vegetable oil such as it is liquefied and chilling the oil to solidify it to form pellets. The vegetable oil will typically be primarily soybean oil, cottonseed oil, peanut oil, corn oil and combinations thereof. The chilling takes place at temperature range of about 12.8-35 degree C, depending upon the vegetable oil being processed. The pellets are used in making dough products such as pie crusts, pizza crust and the like. The dough products comprise ingredients such as flour, sweeteners, egg, milk and water. ( see col. 1 lines 30-44, col. 2 lines 28-47, lines 62-65, col. 4 lines 13-16, col. 5 lines 1-8)

While Kincs et al disclose using the solidified oil in pie crust, they do not disclose the specific formulation of the crust as claimed. Also, they do not disclose the processing temperature and the temperature of water and flour and the steps of cooling water, the temperature of the solidified fat and mixing the cooled water with the flour and frozen oil/fat. Kincs et al are also silent about the crust having zero hydrogenated fat constituent.

Peleg et al disclose a pie crust and method of making it. They disclose the components of the pie crust and the composition as shown in column 2. They also

teach to use water chilled to a temperature range of 1.6-7.1 degree C to form the dough. They teach conventional dough forming procedure for forming the crust including the step of chilling the flour components to a temperature of less than about 9.9 degree C. ( col. 2, col. 4 lines 1-10)

The textbook teaches the pie dough should be kept cool about 15 degree C during mixing and make-up to keep the consistency of the fat and for gluten development.

Kincs et al teach to make pie crust; thus, it would have been obvious to one skilled in the art to use any known dough formulation to make the crust. Such formulation is exemplified in the Peleg et al teaching. It would also have been obvious to vary the formulation depending on the type of crust wanted and the flavor, texture desired. Such variation would have been within the skill of one in the art. Kincs et al disclose on col. 2 lines 15-17, vegetable oil, typically partially hydrogenated vegetable oil". This disclosure clearly suggests that while the oil used is typically partially hydrogenated oil, it does not have to be hydrogenated oil. Knowing the unhealthy aspect of hydrogenated oil, it would have been obvious to one skilled in the art to use natural oil or non-hydrogenated oil when desiring a healthier product. This variation is fully suggested by Kincs and would have been readily apparent to one skilled in the art. Kincs et al do not limit the oil to only hydrogenated oil; this is clearly seen in the claims which only recite vegetable oil. While the oil in Kincs et al is not frozen to the same temperature as claimed, Kincs et al teach the temperature can vary depending upon the vegetable oil being processed. Thus, it would have been obvious to use lower temperature when the oil being processed requires lower temperature to solidify. The temperature is a result-

effective variable which can be determined by one skilled in the art. It would also have been obvious to chill the flour and water and to carry out the mixing at the cooled temperature for the reason taught by Peleg et al and the baking textbook. Such processing steps are conventional as shown by the prior art. The amount of up to 50% comprising shaved, flaked or ground ice include 0 amount of such component. Furthermore, it is notoriously well known in the art to use ice to make chilled water and both Peleg and the textbook teach to use chilled water in the making of pie crust.

In the response filed 10/4/2007, applicant argues that the Kincs pelletized shortening is nothing like the frozen pellet and that Kincs only mentions pie crusts in passing occurring exactly once. This argument is not persuasive. The Kincs pelletized shortening is solidified fat particles that have been chilled at least in the temperature of 12.8-35 degree C. However, Kincs discloses that the temperature is depending upon the vegetable oil being processed, the particular type of chilling and crystallizing device and the type of equipment downstream of it. The Kincs product is a solid product which means it is a frozen product because oil does not form regular crystal when it freezes. When oil is subjected to cool temperature, it forms a solid and does not move around; thus, a solid oil is a frozen oil and Kincs discloses solid oil particles. On column 5 lines 1-9, Kincs discloses a dough formulation and this formulation can be used to make pie crust; thus, the Kincs disclosure does include pie crust. While the main components of pie crust is flour, fat particle and water, the formulation can vary depending on the type of crust wanted and the texture and flavor desired. This demonstrated in the Peleg et al reference as shown in column 2. Applicant further argues that no conclusion can be

raised as to the use of dis-use of winterized oils by Kincs. The examiner respectfully disagrees. Kincs does not disclose that the oil is winterized; thus, the only conclusion that can be drawn is that the oil is non-winterized. In any event, if such inherent conclusion is not drawn, the limitation that the oil is non-winterized does not define over Kincs. Winterization of oil is a known process in the art for removing particulate material, including wax from oil. Kincs does not disclose anything that oil without winterization is a problem for use in making the solid oil particles. Thus, it would have been obvious to one skilled in the art to not winterize the oil because winterizing entails added processing steps in which there is no indication in Kincs that they are needed.

Applicant further argues that Kincs refers to partially hydrogenated or hydrogenated vegetabe oil and never is a non-hydrogenated oil/fat suggested or mentioned. On column 2 lines 15-16, Kincs discloses " vegetable oil, typically partially hydrogenated vegetable oil". This disclosure clearly suggests to one skilled in the art that hydrogenated oil is typically used but non-hydrogenated oil can also be used. It would have been obvious to select non-hydrogenated oil when desiring a healthier oil product. Such selection would have been readily apparent to one skilled in the art. Applicant argues the Kincs patent was filed in 1996 and there was much less concern about the unhealthy aspect of hydrogenated oil and the reference must be read in that light. The basis of this argument is not understood. The question of obviousness is whether it would have been obvious to one skilled in the art at the time the instant application was filed, not at the time the reference was filed. Knowing the unhealthy aspect of hydrogenated oil, it is readily apparent to one skilled in the to select non-

hydrogenated oil when desiring a healthier product. Applicant has not presented any convincing evidence why such selection would not have been obvious. Applicant argues there is no reason to expect that a non-hydrogenated oil would behave in the manner taught by Kincs at the temperature taught in his application. This argument is not supported by factual evidence. The fact that Kincs discloses the oil is typically hydrogenated oil indicates that non-hydrogenated oil can be used. Claim 1 of the Kincs patent recites vegetable oil; the oil is not limited to only hydrogenated oil.

With respect to the Peleg reference, applicant argues the action conveniently overlooks all of the other pie crust dough required components. It is not an issue if Peleg discloses other ingredients because the claims do not exclude the other components disclosed by Peleg. Thus, it is not a fact that the action overlooks the components. It is a fact that the other components do not need to be addressed because they are not excluded from the claims. The language " comprising" in the claims do not exclude other components; thus, they are not limitation to be addressed. Applicant further argues Peleg discloses animal fats, and hydrogenated vegetable fat. It is not suggested to substitute the fat disclosed in Peleg for the solid fat particles disclosed in Kincs. In any event, the decision to select hydrogenated vegetable fat or non-hydrogenated vegetable fat would have been an obvious matter of choice depending on the nutrition desired. As to the comment concerning water containing shaved, flake or finely ground ice, Peleg teaches to use chilled water to form the dough. It is notoriously well known to use ice to form chilled water. It would have been obvious to add ice to the water to form chilled water. Applicant does not argue why this would

not have been obvious. Applicant argues the presence of ice in the water is significantly different than using ice to prepare cool water. The examiner fails to see this point. Adding ice to water to form chilled water results in water containing ice. Water having ice particles results in water containing ice. Ice particles come in variety of sizes. There are ice cube, crushed ice, shaved ice etc.. It would have been obvious to use ice in any size as an obvious matter of choice and convenience. Applicant argues none of the references specifically describe the cold mixed formulation. The textbook teaches that pie dough must be formed at 15 degree C. If the dough is formed at cold temperature, then the pie crust that is formed from the dough is a cold-mixed formulation because it is formed at cold temperature. The temperature taught in the cookbook is within the range claimed.

In summary Kincs disclose solid/frozen oil particles that are used in dough formulation for making pie crust. Kincs does not specifically disclose the composition as claimed. However, as shown by Peleg, pie dough having flour, water and fat content as claimed is conventional. It would have been obvious to use any known formulation for making the pie crust in Kincs. Peleg and the textbook also teaches the steps of making the pie crust; it would have been obvious to one skilled in the art to use the known method of making pie crust as taught in Peleg and the textbook to make the pie crust as disclosed in Kincs. Applicant argues the rejection is based on hindsight. In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long

as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971). In the instant case, the concept and formulation are taught in the prior art and does not include knowledge from applicant's disclosure.

Applicant's arguments filed 10/4/07 have been fully considered but they are not persuasive.

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Lien T. Tran whose telephone number is 571-272-1408. The examiner can normally be reached on Monday-Thursday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

December 10, 2007

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Lien Tran

LIEN TRAN
PRIMARY EXAMINER
Group 1700